LIBRARY
SUPREME COURT, U. S.

FILED
JUN 13 1968
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 189

**ALVIN A. JACOBSEN, Administrator of the Estate of Alan A. Jacobsen, Deceased,**

*Petitioner,*

vs.

**INTERNATIONAL TRANSPORT, INC., E. E. WOLF, ALLIS-CHALMERS MFG. CO. and JACK M. BROWN, a/k/a JACK M. BROWN, SR.,**

*Respondents.*

## Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

WALTER A. NEWPORT, JR.,
306 Citizens Federal Bldg.,
Davenport, Iowa 52801,
*Attorney for Petitioner.*

MIDWEST LAW PRINTING CO., 336 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-3988

## INDEX


| | PAGE |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional Provisions And Statutes Involved | 3 |
| Statement Of The Case | 4 |
| Reasons For Granting The Writ | 7 |
| A. This Case, If Permitted To Stand, Would Effectively Overrule Johnson v. United States, 333 U.S. 10 (February, 1948). It Totally Ignores The Purpose Of The Fourth Amendment To The Constitution Of The United States And It Results In Serious Conflict With Schmerber v. California, 384 U.S. 757 (June, 1966) and United States v. Rabinowitz, 339 U.S. 56 (October, 1949), Previously Decided By This Court | 7 |
| B. This Case Is Violative Of The Fourth Amendment On A Second Clear And Distinct Ground Which Has Never Before Been Decided In This Court. If Permitted To Stand, Its Significance Would Be In Direct Conflict With Applicable Decisions Of This Court. The Issue Should Be Decided By This Court So The Point Is Settled Once And For All | 10 |

C.

This Case Is In Conflict With The Case Of Rochin v. California, 342 U.S. 165 (January, 1952), And Other Applicable Decisions Of This Court In That Society's Sense Of Fair Play And Decency Must Be Violently Offended By What Occurred In The Taking Of The Blood Sample In The Instant Case, Yet The Evidence Resulting Therefrom Was Held Admissible ..... 12

Conclusion ..... 15

Appendices:

A—(Opinion of the U. S. Court of Appeals for the Eighth Circuit) ..... 1a

B—(Judgment of the U. S. Court of Appeals for the Eighth Circuit) ..... 10a

C—(Constitutional Provisions and Statutes Involved) ..... 11a

## List Of Authorities Cited

*Cases*:

Breithaupt v. Abram, 352 U.S. 432 ..... 10
Johnson v. United States, 333 U.S. 10 (February, 1948) ..... 7, 9, 11
Preston v. United States, 376 U.S. 364 ..... 8
Rochin v. California, 342 U.S. 165 (January, 1952) ..... 12, 14, 15
Schmerber v. California, 384 U.S. 757 ..... 7, 8, 10, 11
United States v. Rabinowitz, 339 U.S. 56 ..... 7, 9, 10 11

*Others*:

Amendment IV, United States Constitution ..... 7, 8, 10, 11, 11a
Section 321B.2, 1966 Code of Iowa ..... 10, 11a
Section 321B.3, 1966 Code of Iowa ..... 11, 11a
Section 321B.4, 1966 Code of Iowa ..... 11, 12, 12a
Section 321B.5, 1966 Code of Iowa ..... 12a
Section 339.5, 1966 Code of Iowa ..... 13a
Section 339.6, 1966 Code of Iowa ..... 13a
Section 339.9, 1966 Code of Iowa ..... 14a
Section 321.271, 1966 Code of Iowa ..... 14a
Amendment Fourteen, United States Constitution ..... 15, 14a

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

---

**No.**

---

**ALVIN A. JACOBSEN, Administrator of the Estate of Alan A. Jacobsen, Deceased,**

*Petitioner,*

vs.

**INTERNATIONAL TRANSPORT, INC., E. E. WOLF, ALLIS-CHALMERS MFG. CO. and JACK M. BROWN, a/k/a JACK M. BROWN, SR.,**

*Respondents.*

---

## Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on March 19, 1968. The Court of Appeals affirmed the District Court's judgment of dismissal, based upon a jury verdict, of Petitioner's suit for damages against Respondents.

## OPINIONS BELOW.

The United States District Court for the Southern District of Iowa did not render an opinion on this case. The Opinion of the Court of Appeals for the Eighth Circuit (Appendix, *infra* pp. 1a-9a) has not been reported at the time of the printing of this Petition.

## JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on March 19, 1968, and a copy thereof is appended to this Petition (Appendix, *infra* p. 10a). The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED.

The Questions Presented are:

1. Where no emergency exists and no destruction of evidence can be involved, and where no arrest has been made nor can be made, is a search and seizure under the Fourth Amendment nonetheless reasonable without a search warrant?

2. Where the Iowa Implied Consent Law requires the written request of a peace officer to be made before a blood sample can be withdrawn for the purpose of determining the alcoholic content thereof, may a third person who is not a peace officer, and without any request from a peace officer, written or oral, take a blood sample for reasons of his own and without a search warrant?

3. Where the Iowa Implied Consent Law protects a blood sample from becoming contaminated from the introduction of outside filth by requiring the use only of new, originally factory wrapped, disposable syringes and needles, kept under strictly sanitary and sterile conditions in drawing blood from the body of an individual, may a blood sample be taken with a dirty, non-sterile, contaminated needle without shocking the conscience and sensibilities of society and without materially deviating from the essence of the stated mandate of the Iowa Implied Consent Law?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fourth Amendment, and the first section (Due Process Clause) of the Fourteenth Amendment, to the Constitution of the United States; together with sections 321B.2, through 321B.5 inclusive, Volume I, pages 1238 and 1239, being parts of the Iowa Implied Consent Law; and sections 339.5, 339.6, and 339.9 of the 1966 Code of Iowa, Volume I, page 1326, and section 321.271 of the 1966 Iowa Code, page 1195, are set forth in the Appendix, *infra* p. 11a *et seq.*

## STATEMENT OF THE CASE.

The Petitioner-Administrator brought his action for damages against Respondents, the operators and owners of a tractor-trailer, all of whom were domiciled in states other than Iowa (R. 1, 7 & 8), for the wrongful death of his son in a collision occurring when Respondents' truck pulled onto a through highway in front of the automobile which Petitioner's son was driving. The basic facts, which are not in dispute, are as follows:

Plaintiff's decedent, his son, was 29 years old, unmarried, and had been regularly and gainfully employed by one employer since his honorable discharge from active duty in the Korean war so that the damages to his estate resulting from his untimely demise were far in excess of the jurisdictional amount required to bring this action (R. 29). On the night he was killed he was driving his Mustang automobile from Davenport, the City in which he worked, to his home in Walcott, Iowa, where both petitioner and his decedent were domiciled (R. 31). Walcott is about 12 miles Westerly of Davenport. Plaintiff's decedent was driving along U. S. Highway No. 6 which was a through highway. Respondent's truck had stopped at the Stop sign at highway 6 (R. 58 & 59) and then pulled out in front of petitioner's decedent (R. 89, last 3 lines).

Police (Peace) officers investigated the accident and were present at the scene of the accident when the deceased was still in his auto prior to being taken to the hospital (R. 37). Decedent was not arrested but was dead by the time he was examined (R. 24).

The County Medical Examiner, a licensed M.D., saw the deceased at the hospital for the first time (R. 24). He had already been advised as to the manner of death and an external examination clearly revealed the cause of death (R. 25). He performed no autopsy because no autopsy was necessary (R. 24).

Acting entirely outside the scope of his statutory duties as a County Medical Examiner and for reasons entirely extraneous to any determination of the cause and manner of death, and without any search warrant being obtained or involved, the Examiner, at his own instance (R. 25, l. 9), withdrew a sample of blood from the person of the petitioner's decedent. No peace officer nor anyone else requested him to do this in writing, or orally, or at all (R. 25, ll. 8-13).

The Examiner believes the needle which he used to take the blood sample was one which he took out of his medical kit: That he had used it previously for the same purpose and had then rinsed it in cold, running water without sterilizing it and put it back in his medical kit which was never sterilized. No factory wrappings could be removed from the needle because the needle had been used before (R. 25, ll. 1-7).

A laboratory chemist ran a test on the blood sample and his findings were that there were 344 milligrams of alcohol per one hundred cc's of blood (R. 69).

Respondents' pathologist testified that a driver of a car who had a blood test of 344 would be weaving around the road as he drove because muscle response "would be very seriously impaired", so if a person were driving a car it would be weaving around as he drove. He might momentarily go straight, but by and large he would be weaving around (R. 82). This would be true of all peo-

ple who had this amount or percent of alcohol (344 mg of alcohol per 100 cc's of blood) in his blood (R. 82, last sentence).

The respondent truck driver, however, testified that petitioner's decedent was driving at all times on his own side of the road, never crossing the center-line of the highway (R. 90, ll. 10-14). He first saw decedent from three-tenths to four-tenths of a mile up the highway and there was nothing abnormal in any way in the appearance of the auto decedent was driving (R. 89, ll. 11-15). It appeared to be driving in a straight line at all times as far as he could tell (R. 89, ll. 16-17). The truck driver was the only eye witness.

The evidence in this case is clear, and undisputed, and incontrovertible, that any alcohol in the blood stream of one who is deceased will not be dissipated but will remain there an indefinite period of time (R. 53, last 2 lines): Presumably until decomposition affects the body as a whole. This is in contrast to alcohol in the blood stream of a living person since that alcohol will be materially dissipated in a matter of a few hours (R. 76). The difference lies in whether the person is alive or dead. In the instant case the person involved was dead.

Prior to the commencement of the trial of the cause, petitioner filed his motion in limine to prevent the introduction of, or reference to, the taking of the blood sample and the test for its alcoholic content that followed, but the motion was overruled (R. 20-28). Petitioner's objections were reserved without the necessity for repeating them in front of the jury (R. 27, last 11 lines), but the matters objected to were permitted to go into evidence (R. 52). The jury returned its verdict for the Respondents (R. 91).

## REASONS FOR GRANTING THE WRIT.

### A.

**THIS CASE, IF PERMITTED TO STAND, WOULD EFFECTIVELY OVERRULE JOHNSON v. UNITED STATES, 333 U.S. 10 (February, 1948). IT TOTALLY IGNORES THE PURPOSE OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND IT RESULTS IN SERIOUS CONFLICT WITH SCHMERBER v. CALIFORNIA, 384 U.S. 757 (June, 1966) and UNITED STATES v. RABINOWITZ, 339 U.S. 56 (October, 1949), PREVIOUSLY DECIDED BY THIS COURT.**

1. *Johnson* v. *United States,* 333 U.S. 10, holds specifically and clearly that:

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." (334 U.S. at p. 14)

The reason is stated as follows:

> "The point of the Fourth Amendment . . . consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." (334 U.S. at p. 14)

While the *Johnson* case recognized certain exceptions, and while *Schmerber* v. *California,* 384 U.S. 757, and *United States* v. *Rabinowitz,* 339 U.S. 56, illustrate two

of those exceptions, the exceptions are clearly defined and limited. The *Schmerber* case specifically states that the drawing of a blood sample from a person's body is a search and seizure such as is covered by the Fourth Amendment (384 U.S. at pp. 767 and 770). And it (*Schmerber*) held that it was not unreasonable for the police officer in that case to cause the blood sample to be taken because:

> "The officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence', *Preston* v. *United States,* 376 U.S. 364 . . . We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system . . . Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." (384 U.S. at pp. 770 and 771)

But in the *Schmerber* case the person whose blood sample was taken was alive. The alcohol was being eliminated by the functioning of the body. In the instant case petitioner's decedent was dead. There was no functioning of his body. As the County Medical Director, a professional and licensed M.D. himself testified,

> "There is no dissipation of alcohol in the blood after a person dies." (R. 53, last two lines)

So the alcohol in a deceased person's blood remains there exactly as it does in the bottle into which the blood sample is placed. There was no emergency in the instant case. The evidence would have remained available until decomposition of decedent's body liberated it. The opportunity to obtain a search warrant was ample and no

circumstances appear which would have rendered the obtaining of a search warrant unnecessary. Where, then, is the justification for ignoring the provisions of the Fourth Amendment and its interpretation in the *Johnson* case? It is submitted that the search here was an unreasonable one because no search warrant was first obtained. To permit the decision below to become the law of the land would be an effective overruling of the *Johnson* case.

2. In *United States* v. *Rabinowitz, supra,* a search was held to be reasonable because it was an incident to a valid arrest. The Court of Appeals in the instant case, after noting that the testimony establishes that the quantity of alcohol in the blood of a deceased person is not diminished by elimination of alcohol through body functions as is the situation with a living person, states:

> "Upon this basis, plaintiff asserts that emergency steps relied upon in cases such as in *Schmerber* . . . are not here present as there is no danger that a reasonable delay to obtain a search warrant would affect the evidentiary value of the sample. The appropriate test is not whether it was reasonable to procure a search warrant but whether the search was reasonable under the existing circumstances. *United States* v. *Rabinowitz* . . ." (Appendix, *infra* pp. 8a-9a)

It is respectfully submitted that the language quoted from the *Rabinowitz* case by the Court of Appeals has no application here. There the search was made as an incident to a lawful arrest. A warrant for the arrest was first obtained, then the defendant was arrested, and then the search occurred. This Court held the search was reasonable. But the *Rabinowitz* case also held that:

> "Of course, a search without warrant incident to an arrest is dependent initially on a valid arrest." (339 U.S. at p. 60)

And running through all the cases is the concept, well-expressed in the *Schmerber* case, as follows:

> ". . . the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." (384 U.S. at p. 768)

Here no reason whatsoever appears as a justification for the intrusion made in violation of the requirements contained in the Fourth Amendment.

**B.**

**THIS CASE IS VIOLATIVE OF THE FOURTH AMENDMENT ON A SECOND CLEAR AND DISTINCT GROUND WHICH HAS NEVER BEFORE BEEN DECIDED IN THIS COURT. IF PERMITTED TO STAND, ITS SIGNIFICANCE WOULD BE IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT. THE ISSUE SHOULD BE DECIDED BY THIS COURT SO THE POINT IS SETTLED ONCE AND FOR ALL.**

The cases of *Schmerber* v. *California, supra,* and *Breithaupt* v. *Abram,* 352 U.S. 432 and other blood sample cases decided by this Court, where no search warrant was obtained, all involved cases where samples of blood were taken at the request of a police officer, state patrolman, or similar law enforcement officers. The Iowa legislature called them "Peace Officers" and defined them, (321B.2—Appendix, *infra* p. 11a). Other decisions of this Court bearing on the question of who may decide whether the right of privacy under the Fourth Amendment must reasonably yield to the right of search are unanimously

in accord, it is believed, that a judicial officer, as a neutral and detached magistrate, should normally make the decision but that under carefully stated guidelines certain law enforcement officers, or peace officers, may make the determination. As this court in the *Rabinowitz* case, *supra,* stated:

> "Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential." (339 U.S. at p. 65)

But in the instant case, the blood sample in question was not taken at the request of any peace officer as defined by the statutes of Iowa, 321B.3 and 321B.4 (Appendix C, *infra* pp. 11a-12a) or by any law enforcement officer in any sense of the word. It was taken by the County Medical Examiner, at his own instance, for statistical purposes only. It was not done as a part of any autopsy for no autopsy was necessary and none was performed. For purposes of the search and seizure here involved, the blood sample was taken by a third party, an interloper who had no standing to take the blood sample from petitioner's decedent under any of the applicable decisions of this Court. To permit such a taking without a warrant and without the written (or oral) request of a law enforcement officer or peace officer would effectively muzzle the plain pronouncements of cases like the *Schmerber* case and the *Johnson* case. What would then be left of the Fourth Amendment? As this Court warned in the *Schmerber* case:

> "The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States' minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions or intrusions under other conditions." (384 U.S. at p. 772)

C.

**THIS CASE IS IN CONFLICT WITH THE CASE OF ROCHIN v. CALIFORNIA, 342 U.S. 165 (January, 1952), AND OTHER APPLICABLE DECISIONS OF THIS COURT IN THAT SOCIETY'S SENSE OF FAIR PLAY AND DECENCY MUST BE VIOLENTLY OFFENDED BY WHAT OCCURRED IN THE TAKING OF THE BLOOD SAMPLE IN THE INSTANT CASE, YET THE EVIDENCE RESULTING THEREFROM WAS HELD ADMISSIBLE.**

To draw a sample of blood from an individual's body is a serious matter, not to be minimized in any way because the invasion is a search for evidence of intoxication. Human decency and every man's sense of fair play requires that any blood so drawn be truly representative of the blood of the person from whom it was drawn. Dirty, contaminated needles would not be countenanced by the public. A contaminated sample does not necessarily produce a true or an accurate result. To use a contaminated sample on which to run a test is inherently offensive to any conscientious person's sense of decency and fair play. The only way to be sure a sample of blood is not contaminated by a dirty needle is to sterilize the needle so it is perfectly sanitary.

The Iowa legislature recognized the necessity for preventing contamination of any blood sample taken (321 B. 4). It there provides that:

> "Only new, originally factory wrapped, disposable syringes and needles, kept under strictly sanitary and sterile conditions shall be used for drawing blood." (Appendix, *infra* p. 12a)

In violation of this clear requirement, and plain language could hardly be more to the point, the County Medical Examiner used a needle which he had used before.

When he had finished using it he merely rinsed it in cold running water and put it back in his medical kit for use whenever he might need it again. He did not attempt to sterilize the needle. Neither did he attempt to sterilize his medical kit. Contamination of the blood sample was therefore almost a foregone conclusion. Whether or not the results were correct is not the key, but it is enlightening to know that under the 344 test which the blood sample in question produced, according to Respondents' expert witness, a pathologist, petitioners decedent would have a very serious muscle impairment. His arms, his legs, his torso, turning his head, and all those "would be very seriously impaired." Petitioner's decedent would be weaving around as he drove. He might momentarily go straight, but that would only be coincidental. By and large he would be weaving around. Moreover, this would be true of any person with a 344 test. Thus it would have been true of the deceased here.

Yet the evidence is clear from the Respondent truck driver, the only eye witness, that petitioner's decedent was not driving in the manner of one with a 344 test. The truck driver first saw the deceased when he was three-tenths to four-tenths of a mile up the highway. There was nothing abnormal about the way in which petitioner's decedent was driving. He never crossed the centerline of the highway and he appeared to be driving in a straight line at all times.

It therefore appears evident that the reasons for requiring a sterile needle, kept under strictly sanitary and sterile conditions, are sound and necessary and that there is a basis for the feeling of outrage that must accompany

the knowledge that a non-sanitary, non-sterilized needle was used in this case for a purpose so important and vital to the rights of our citizenry.

The case of *Rochin* v. *California,* 342 U.S. 165, January 1952, clearly holds that substances may not be removed from the body of an individual if by so doing a violation occurs of the constitutional guarantees of respect for personal immunities which

> ". . . are so rooted in the traditions and conscience of our people as to be ranked as fundamental." (342 U.S. at p. 169)

With this concept in mind, this Court in the *Rochin* case further held that:

> ". . . we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocked the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of their constitutional differentiation." (342 U.S. at p. 172)

Under all the applicable decisions of this Court, it is submitted, the use of the non-sterile needle in this case constituted an unreasonable method of taking the blood sample and resulted in an unreasonable search and seizure.

The further language of the *Rochin* case is also enlightening:

> "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'." (342 U.S. 173)

Further, whenever a violation of one's rights under the Fourth Amendment has occurred, it is implicit in that, and included as a part of the violation, that he has not been accorded due process of law under the Due Process clause of the Fourteenth Amendment.

## CONCLUSION.

For the important reasons assigned, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

WALTER A. NEWPORT, JR.,
306 Citizens Federal Bldg.,
Davenport, Iowa 52801,
*Attorney for Petitioner.*

# APPENDIX A

(Opinion)

IN THE

## UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,939.

Alvin A. Jacobsen, Administrator of the Estate of Alan A. Jacobsen, Deceased,

Appellant,

v.

International Transport, Inc., E. E. Wolf, Allis-Chalmers Mfg. Co., and Jack M. Brown, a/k/a Jack M. Brown, Sr.,

Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

[March 19, 1968.]

Before VAN OOSTERHOUT, Chief Judge; MATTHES, Circuit Judge, and HARRIS, Chief District Judge.

VAN OOSTERHOUT, Chief Judge.

This is a timely appeal by Alvin A. Jacobsen, administrator of the estate of his deceased son Alan, from final judgment based upon a jury verdict for defendants dismissing his complaint against the defendants, the operator and owners of a tractor-trailer, for the wrongful death of Alan Jacobsen in a collision between the automobile

Alan Jacobsen was driving and defendants' vehicle. The accident occurred on the early morning of April 22, 1966, near Walcott, Iowa. Hence the substantive law of Iowa controls. Jurisdiction, based upon diversity of citizenship and the requisite amount, is established.

Plaintiff bases this appeal solely upon his contention that testimony with respect to the alcoholic content of a blood sample withdrawn from the body of the decedent by the county medical examiner was improperly admitted into evidence over appropriate objection that the sample was obtained by means of an alleged illegal search and seizure and that the information contained in the medical examiner's report constituted an inadmissible privileged communication. The facts surrounding the fatal automobile accident are not relevant to the issues raised by this appeal and hence no purpose will be served by setting out such facts.

Plaintiff in support of his contention that the blood sample was illegally taken from the body of his decedent and that the result of the test was improperly received in evidence, urges:

1. The result of the blood test is a privileged communication under § 321.271 I.C.A. and hence, inadmissible.

2. The result of the test is not admissible under the Iowa Implied Consent Law, ch. 321B, I.C.A., because (a) no written request for the sample was made by a peace officer as required by § 321B.3, and (b) the medical examiner failed to use a new factory wrapped needle in withdrawing the blood, as required by § 321B.4.

3. The taking of the blood sample constituted an unreasonable search and seizure in violation of the rights of the decedent under the state and federal constitutions.

We hold that plaintiff has failed to establish that the court committed error in receiving in evidence the results of the blood test, and we affirm the judgment of dismissal.

We shall summarize the pertinent facts bearing upon the issues before us. Dr. Perkins, a competent, qualified and licensed physician, is the duly appointed, qualified and acting medical examiner of Scott County, Iowa, the county in which the fatal accident here involved occurred. Dr. Perkins was promptly advised of the fatal accident and was told the body was being taken to the Mercy Hospital. He immediately went to the hospital and in his official capacity examined the decedent and found him to be dead. Dr. Perkins took charge of the dead body for the purpose of making the inquiry and report required by § 339.5, I.C.A.

He withdrew a blood sample from the body by means of a needle in accordance with the usual medical technique. He is not certain whether he used a needle from his own kit or one supplied by the hospital but he testified that in either event, the needle used was not a new one and that it was not taken out of an original factory package. Dr. Perkins testified that there was nothing in the procedure which he used to withdraw the blood which in any way would affect the validity of the blood test. The sample taken was properly preserved and traced into the hands of a qualified chemist who examined it and who appeared as a witness at the trial and described in detail the procedure used in making the test and vouched for its validity. The chemist testified that the test established that there were 344 milligrams of alcohol per one hundred c.c's of blood.

Dr. Perkins testified that he took the sample in his capacity as medical examiner at his own instance and that

he had no written request for the taking of the sample from any peace officer. Dr. Perkins further stated in a supplemental affidavit that he took the sample for statistical purposes only, and "The taking of this blood sample was entirely extraneous insofar as involving any determination of the cause and manner of death of the decedent were concerned since my external examination and inquiries of other persons fully and completely disclosed the cause and manner of death of Mr. Jacobsen."

It is doubtless true that the injuries inflicted by the accident were the cause of the death and that the taking of the blood sample was not necessary to determine the cause of death. Upon the record before us, we cannot say that the taking of the blood sample did not fall within the scope of the rights and duties of the medical examiner to make the investigation required by statute.

Several officers testified that they detected a strong odor of alcohol about the body of the decedent immediately after the accident. The medical examiner was not asked whether he detected an alcoholic odor but it is reasonable to infer in event the officers' testimony is believed that the medical examiner had probable cause to believe from his examination of the body that the decedent had imbibed alcohol. We cannot say upon the record before us that the taking of the blood test had no reasonable relationship to the duties that the medical examiner was required to perform.

We find no merit to plaintiff's contention that § 321.271, I.C.A., makes the report of the medical examiner a privileged communication. Such statute deals with required reports to be filed with the Department of Public Safety. The powers and the duties of the medical examiner are set out in ch. 339. I.C.A.

In *Lessenhop* v. *Norton,* Iowa, 153 N.W. 2d 107, 110-11, the court states:

> "Section 339.5 makes it clear the examiner's duties are to inquire as to 'the cause and manner of death' and file his findings with the county attorney and the criminal investigation division of the public safety department. It would seem his investigation is directed toward evidence of a crime and is not the same as an accident report filed by an investigation officer with the public safety department under section 321.266 of the Code. . . .
>
> . . . . .
>
> "Section 339.9 provides: 'Reports of investigation made by the county medical examiner or his assistants, and records and reports of autopsies made under the authority of this chapter, shall be received as evidence in any court or other proceedings, *except* that statements by witnesses or other persons and *conclusions upon extraneous matters are not* hereby made admissible. * * *' (Emphasis added.) . . . It does not attempt to pass on the admissibility of reports containing extraneous matters or define extraneous matters. Obviously, then, that admissibility is to be governed by other well-established rules of evidence which the court must apply when timely and proper objections are made."

In *Lessenhop,* the court held a conclusory statement on the coroner's report stating the blood alcohol level was not admissible. The opinion stresses the lack of proper foundation for admission of the blood test result in that the manner of taking and preserving the sample was not shown nor was the identity of the person testing the sample disclosed, so as to afford opportunity for cross examination as to procedures used in making the test. It would appear that the evidence was excluded on the basis of lack of foundation.

The court in its opinion, p. 111, observes, "appellant did not seriously contend that the medical examiner had no authority to take a blood sample from persons killed in accidents, . . ." The court did not expressly pass on the right of the medical examiner to extract a blood sample but the foregoing quoted statement and the opinion as a whole leave a strong impression that the Iowa court was of the view that power so to do exists in the medical examiner.

In *Bill* v. *Farm Bureau Life Ins. Co.*, Iowa, 119 N.W. 2d 768, 774, the court holds it was error to exclude the medical examiner's report, stating, "Section 339.9, supra, expressly provides that reports of investigations by the county medical examiner, and records and reports of autopsies made under his authority, shall be received in evidence."

We hold that the medical examiner's report is admissible under § 339.9 and that such report does not fall within the restrictions imposed by § 321.271.

The trial court based its holding that the result of the blood test was admissible principally upon the Iowa Implied Consent Law, ch. 321B, I.C.A. In so doing, we believe the trial court properly interpreted and applied the Iowa Implied Consent Law. Our holding hereinabove that § 339.9 controls would in itself justify an affirmance. However, since the trial court reached its decision largely on the Implied Consent Law and such holding has a bearing on the unlawful search and seizure issue hereinafter discussed, we deem it advisable to consider the admissibility of the blood test under the Implied Consent Law.

The standards for admissibility of a blood test are stated by the Iowa court in *Lessenhop* v. *Norton*, supra,

and *State* v. *Charlson,* Iowa, 154 N.W. 2d 829. Plaintiff's challenges to the admissibility of the blood test are continued to two grounds which are identical to the grounds of challenge made in *Charlson,* supra, such grounds being (1) the test is inadmissible because the needle used to extract the blood was not in a factory wrapped package as required by § 321B.4; (2) the sample was not taken at the written request of a peace officer.

*Charlson* squarely rejects the new needle requirement with respect to deceased persons. We need not and do not determine what the effect of a conscious person's refusal to permit the withdrawal of blood by a nonconforming needle might be.

The second point, relating to a written request for the sample by a peace officer, is determined on the basis of voluntary waiver in *Charlson.* That case and the authorities therein cited clearly hold that the Implied Consent Law is to be liberally construed in order to give the best effect to its purpose. In the light of the broad statutory powers given the medical examiner, it is not reasonable to believe that the legislature intended to require that the examiner obtain a request from a sheriff or a highway patrolman as a basis for his authority to extract a blood sample. Such an interpretation would fly in the face of the broad statutory powers given the medical examiner to conduct an inquiry and make an autopsy.

Moreover, as pointed out in *Charlson,* supra, at p. 833:

> " 'Section 321B.12. Other evidence. *The provisions of this chapter shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether the person was in an intoxicated condition.'* (emphasis added)"
>
> "The evidence sought to be suppressed here fairly falls within the term 'any other competent evidence',

etc. to which 321B.12 refers. Further, this section expresses a legislative intent the chapter is not to be construed as limiting the introduction of competent evidence bearing on whether an accused was intoxicated."

The blood sample here in controversy has been properly taken, identified and preserved and proper evidence is in the record as to the reliability of the analysis vouched for by the chemist. Plaintiff urges, however, that the result of the test is inadmissible because the blood sample was obtained by means of an unreasonable and illegal search and seizure under the Fourth Amendment to the United States Constitution and Article I, § 8, of the Iowa Constitution. Such contention lacks merit. The blood was taken from a dead body by a licensed physician according to the usual medical techniques, acting under statutory authority given him as a medical examiner to take possession of the body and conduct an autopsy. The power to conduct an autopsy would clearly include the right to extract a blood sample. Under the circumstances of this case, we hold that the search and seizure was not unreasonable. See *Schmerber* v. *California,* 384 U.S. 757, 766; *Breithaupt* v. *Abram,* 352 U.S. 432; *State* v. *Findlay,* Iowa, 145 N.W. 2d 650; *Diener* v. *Mid-American Coaches, Inc.,* Mo., 378 S.W. 2d 509; *Davis* v. *Brooks Transp. Co.,* D. Del. 186 F. Supp. 366.

The testimony in the present case establishes that the quantity of alcohol in the blood of a deceased person is not diminished by elimination of alcohol through body functions as is the situation with a living person. Upon this basis, plaintiff asserts that emergency steps relied upon in cases such as *Schmerber* and *Findlay* are not here present as there is no danger that a reasonable delay to obtain a search warrant would affect the evidentiary value of the sample. The appropriate test is not whether it

was reasonable to procure a search warrant but whether the search was reasonable under the existing circumstances. *United States* v. *Rabinowitz,* 339 U.S. 56; *Wright* v. *United States,* 8 Cir., ..... F. 2d ..... (Feb. 19, 1968).

From what has heretofore been said, it is apparent that the broad power given the medical examiner makes the taking of the blood sample under the circumstances and conditions reflected by this record reasonable. We have heretofore held that there has been substantial compliance with the Iowa Implied Consent Law and such determination supports the conclusion that the search was reasonable. Section 321B.5 provides that in the case of a dead or unconscious person, the implied consent to the taking of a blood sample shall not be deemed to have been withdrawn and that the certification that the person from whom the blood was extracted is dead shall obviate requirements of arrest and advice as to legal rights.

The trial court committed no error in receiving in evidence the testimony with respect to the result of the blood test.

The judgment of dismissal is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

# APPENDIX B

(Judgment)

**IN THE**

## UNITED STATES COURT OF APPEALS

**FOR THE EIGHTH CIRCUIT**

No. 18,939. SEPTEMBER TERM, 1967

Alvin A. Jacobsen, Administrator of the Estate of Alan A. Jacobsen, deceased,
Appellant,
vs.
International Transport, Inc., E. E. Wolf, Allis-Chalmers Mfg. Co., and Jack M. Brown, a/k/a Jack M. Brown, Sr.,
Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

March 19, 1968.

# APPENDIX C

**(Constitutional Provisions and Statutes Involved)**

**AMENDMENT IV**
**UNITED STATES CONSTITUTION**

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

**SECTION 321B.2**
**1966 CODE OF IOWA**

"321B.2. *Definitions.* As used in this chapter the words "peace officer" mean:

1. Members of the highway patrol.
2. Police officers under civil service as provided in chapter 365.
3. Sheriffs.
4. Regular deputy sheriffs who have had formal police training."

**SECTION 321B.3**
**1966 CODE OF IOWA**

"321B.3. *Implied Consent to Test.* Any person who operates a motor vehicle in this state upon a public highway, under such circumstances as to give reasonable grounds to believe the person to have been operating a motor vehicle while in an intoxicated condition, shall be deemed to have given consent to the withdrawal from his body of specimens of his blood, breath, saliva, or urine,

and to a chemical test or tests thereof, for the purpose of determining the alcoholic content of his blood, subject to the provisions hereinafter set out. The withdrawal of such body substances, and the test or tests thereof, shall be administered *at the written request of a peace officer* having reasonable grounds to believe the person to have been operating a motor vehicle upon a public highway of this state while in an intoxicated condition, and only after the peace officer has placed such person under arrest for the offense of operating a motor vehicle while in an intoxicated condition." (Emphasis added)

**SECTION 321B.4**
**1966 CODE OF IOWA**

"321B.4. *Taking sample for test.* Only a licensed physician, or a medical technologist or registered nurse designated by a licensed physician as his representative, *acting at the written request of a peace officer* may withdraw such body substances for the purpose of determining the alcoholic content of the person's blood. Only new, originally factory wrapped, disposable syringes and needles, kept under strictly sanitary and sterile conditions shall be used for drawing blood." (Emphasis added)

**SECTION 321B.5**
**1966 CODE OF IOWA**

"321B.5. *Dead or unconscious persons.* Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of consent or refusal shall be deemed not to have withdrawn the consent provided by section 321B.3, and the test may be given; provided that a licensed physician shall certify in advance of such test that such person is dead, unconscious or otherwise in a condition rendering him incapable of consent or refusal. In such case such condition shall obviate the requirements of arrest and advice pursuant to section 321B.6."

**SECTION 339.5**
**1966 CODE OF IOWA**

"339.5. *Inquiry—report.* Upon receipt of such notice the county medical examiner shall take charge of the dead body, make inquiries regarding the cause and manner of death, reduce his findings to writing on forms provided by the commissioner of public health for such purpose, and deliver the original of such form to the county attorney, retaining one copy for his own use, and forwarding another copy to the criminal investigation division of the state department of public safety.

"For each such preliminary investigation, including the making of the required reports, the county medical examiner shall receive a fee of fifteen dollars, plus his actual expenses, to be paid by the county for which he is appointed."

**SECTION 339.6**
**1966 CODE OF IOWA**

"339.6. *Autopsy.* If, in the opinion of the county medical examiner, an autopsy examination is advisable and in the public interest, such autopsy shall be performed. The autopsy may be made by the county medical examiner or by such competent pathologist as he may designate.
"A full record and report of the facts developed by the autopsy and findings of the person making such autopsy shall be made promptly and filed with the county medical examiner and in the office of the county attorney. Pertinent information embodied therein shall be furnished forthwith to the appropriate state department or agency by the county medical examiner."

**SECTION 339.9**
**1966 CODE OF IOWA**

"339.9. *Evidence admissible in court.* Reports of investigations made by the county medical examiner or his assistants and records and reports of autopsies made under the authority of this chapter, shall be received as evidence in any court or other proceedings, except that statements by witnesses or other persons and conclusions upon extraneous matters are not hereby made admissible."

**SECTION 321.271**
**1966 CODE OF IOWA**

"321.271. *Reports confidential—without prejudice.* All accident reports shall be in writing and the written report shall be without prejudice to the individual so reporting and shall be for the confidential use of the department except that upon the request of any person involved in an accident, or the attorney for such person the department shall disclose the identity of the person involved in the accident and his address. A written report filed with the department shall not be admissible in or used in evidence in any civil case arising out of the facts on which the report is based."

**AMENDMENT FOURTEEN**
**SECTION 1 DUE PROCESS CLAUSE**
**UNITED STATES CONSTITUTION**

"Section 1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SUPREME COURT, U. S.

FILED
JUN 28 1968
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

## No. 189

**ALVIN A. JACOBSEN, Administrator of the Estate of Alan A. Jacobsen, Deceased,**

*Petitioner,*

vs.

**INTERNATIONAL TRANSPORT, INC., E. E. WOLF, ALLIS-CHALMERS MFG. CO. and JACK M. BROWN, a/k/a JACK M. BROWN, SR.,**

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES A. LORENTZEN,
THEODORE T. DUFFIELD and
GEORGE E. WRIGHT,
729 Exchange Building,
Des Moines, Iowa 50309,
*Attorneys for Respondents.*

MIDWEST LAW PRINTING CO., 326 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-3986

# INDEX


PAGE

Questions Presented ..... 1

Reasons For Refusing The Writ ..... 2

Conclusion ..... 7

Appendix A ..... 9


## List Of Authorities Cited


*Cases*:

Breithaupt v. Abram, 352 U.S. 432 ..... 2

Davis v. Brooks Transportation Co., 186 F. Supp. 366 ..... 5

Schmerber v. California, 384 U.S. 757 ..... 4

United States v. Rabinowitz, 339 U.S. 56 ..... 7

*Others*:

Amendment IV, United States Constitution ..... 7

Section 339.5, 1966 Code of Iowa ..... 4, 9

Section 339.6, 1966 Code of Iowa ..... 4, 9

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

---

## No.

---

**ALVIN A. JACOBSEN, Administrator of the Estate of Alan A. Jacobsen, Deceased,**

*Petitioner,*

vs.

**INTERNATIONAL TRANSPORT, INC., E. E. WOLF, ALLIS-CHALMERS MFG. CO. and JACK M. BROWN, a/k/a JACK M. BROWN, SR.,**

*Respondents.*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

---

## QUESTIONS PRESENTED.

The only question presented by this case is whether or not the conduct of a licensed physician acting under statutory authority as County Medical Examiner in taking possession of a body, and taking a blood sample according to usual medical techniques is to be considered an unreasonable search and seizure violative of the Fourth Amendment to the United States Constitution.

## REASONS FOR REFUSING THE WRIT.

The opinion of the United States Court of Appeals for the Eighth Circuit handed down in this case, and included in Appendix A attached to the Petition for this Writ neither decides a Federal Question of any substance not previously determined by this Court, nor does it decide any question in a way that is not in accord with applicable decisions of this Court.

The decision of the Circuit Court is not in conflict with any decision of another Court of Appeals on the same matter, nor has it decided an important state or territorial question in any way in conflict with applicable state or territorial law.

The decision did not decide any question of federal law which has not been settled by this Court nor has it decided any federal question in conflict with any decision of this court.

This Court in two decisions has already set down the standard of taking blood tests as it relates to the Constitutional guarantees afforded by the Fourth Amendment of the United States Constitution. One decision is *Breithaupt* v. *Abram,* 352 U.S. 432, (1957). In that case this Court held that the taking of a blood test from an unconscious person did not violate any of the subject's constitutional rights. The issue in that case was whether or not a criminal conviction should be set aside. In the case at bar the issue is whether or not there was error in admitting the blood test in a civil action to recover damages for wrongful death. At page 435 of 352 U.S.

this Court distinguished other cases where it was held that taking the blood samples was violative of constitutional rights. This Court pointed out that it set aside the convictions in the prior cases because the method of taking the test "shocked the conscience" and was so "brutal" and "offensive" that it did not comport with traditional ideas of fair play and decency. They therefore found that the previous cases were offensive to the due process. However, in the *Breithaupt case,* supra., this court held that the method of taking the test was not such that would shock the conscience of the Court. The test in that case was taken at a hospital under the direction of a physician, according to good medical standards.

This is exactly what occurred in the case at bar. The blood test was taken at a hospital by a physician, the County Medical Examiner, and at page 53 of the record, Dr. Perkins testified as follows:

> "The techniques I used for withdrawing this blood sample were according to usual medical techniques. There was nothing done to the body in my presence, nor was there anything done to the body in withdrawing this blood which would in any way affect, in my opinion, the blood alcohol test that was run by the chemists."

Obviously, the withdrawing of the blood with a three inch needle directly from the heart of a dead man does not shock the conscience of the Court. This is standard medical practice. Nor was the withdrawing of this sample done with a filthy, contaminated needle as charged by the Petitioners. There is no evidence to support such an allegation, and the record is clear that such was not the case.

A properly selected jury also passed upon the issue of the validity of the test. If the jury had believed from all of the evidence in the record that the needle was filthy and contaminated as charged by the petitioners, we doubt very seriously if they would have given any credence to the result of the test. The only competent medical evidence in this record is that the test was taken according to usual medical techniques, and there was nothing done in the process of withdrawing the blood that would in any way affect the blood alcohol test that was run by the chemists.

This Court in 1966 again set down some standards that relate to the withdrawing of blood samples from intoxicated persons. This was the case of *Schmerber* v. *California,* 384 U.S. 757, 16 L. Ed. 2d 908, 86 Sup. Ct. 1826 decided June 20, 1966. In that case the blood sample was taken over the objections of the intoxicated person. This Court at page 759 of 384 U.S. held that there was no violation of a due process clause. At page 766 this Court held that the allegations there was an illegal search and seizure were not justified. The principles set down in that case were followed by the Circuit Court in deciding this case.

Petitioner states that both of the above cited cases, *Schmerber* and *Breithaupt,* are in conflict with the decision of the Court of Appeals which they seek to have reviewed. They attempt to distinguish the cases by saying that in *Schmerber* and *Breithaupt* the blood test was taken at the instance of a police officer. In the case at bar it was taken by the County Medical Examiner pursuant to Sec. 339.5 and Sec. 339.6 of the 1966 Code of Iowa, which authorizes the Medical Examiner to take charge

of the dead body and make inquiries regarding the cause and manner of death, and conduct an autopsy examination if advisable and in the public interest. There is no good reason for distinguishing the cases on this basis.

These respondents agree with the Circuit Court of Appeals where it said in its opinion, page 8a, Appendix A of the Petition, the following:

> "The blood was taken from a dead body by a licensed physician according to the usual medical technique acting under statutory authority given him as a County Medical Examiner to take possession of the body and conduct an autopsy. The power to conduct an autopsy would clearly include the right to extract the blood sample. Under the circumstances of this case, we hold that the search and seizure was not unreasonable. See *Schmerber* v. *California*, 384 U.S. 757, 766; *Breithaupt* v. *Abram*, 352 U.S. 432; *State* v *Findlay, Iowa*, 145 N.W. 2d 650; *Diener* v. *Mid American Coaches, Inc.*, Missouri, 378 S.W. 2d 509; *Davis* v. *Brooks Transport Company*, Del. 186 F. Supp. 366."

In deciding whether or not the search was reasonable under the circumstances of this case we are fortunate to have a decision from the District Court of Delaware entitled *Davis* v. *Brooks Transportation Company*, 186 F. Supp. 366. In that case blood samples were taken from three dead men and admitted into evidence. The court held that no constitutional rights were violated. At page 370 of 186 F. Supp., the court answers a contention made by the Appellant in this case. There it is said:

> "However, plaintiffs argue first that the evidence of drunkenness was illegally obtained because the blood tests were taken without the consent of the plaintiffs all of whom were dead and, accordingly,

their Constitutional rights were invaded. But this argument will not stand close examination. The Constitutional rights asserted by plaintiffs' intestates here were personal to the deceased alone. *Richards* v. *State,* Del. Sup. Ct. 1950, 6 Terry 573, 77 A. 2d 199; *Mumford* v. *Croft,* Del. Super 1952, 8 Terry 464, 93 A. 2d 506; *State* v. *Carter,* Del. Super. 1952, 8 Terry 147, 89 A. 2d 131. The rationale of the rule is stated in the comment on American Law Institute's Model Code of Evidence Rule 202):

> '* * * The object of the privilege is protection against punishment, not prevention of compulsory disclosure of criminal conduct. Hence when punishment for a given crime is made impossible, the privilege with reference to that crime ceases to exist.'

Here, the plaintiffs were dead. They could not be indicted and tried for drunken driving or intoxication. Thus, the privilege if any, had disappeared.

A number of cases are directly in point. Thus, in the following cases, the evidence of blood samples containing alcohol taken from the body of a deceased were admitted over objection. *Fretz* v. *Anderson,* Sup. Ct. Utah 1956, 5 Utah 2d 290, 300 P. 2d 642; *Hartman* v. *Harder,* Tex. Civ. App. 1959, 322 S.W. 2d 555.

There are also a number of decisions admitting evidence of blood containing alcohol taken from a person when unconscious upon the ground that the Constitutional privilege only extends to testimonial evidence. (For instance, see *Alexander* v. *State,* Crim. Ct. of Appeals of Okl. 1956, 305 P. 2d 572.) I express no opinion as to this theory for, in any event, it is clear from the authorities first cited that the plaintiffs' argument is without foundation."

We believe the analysis of the U. S. Court of Appeals, Eighth Circuit, in the case at bar which is found at 8a of Appendix A of the Petition is appropriate to the Petitioner's contentions. There the Court said:

> "The testimony in the present case establishes that the quantity of alcohol in the blood of a deceased person is not diminishd by elimination of alcohol through body functions as is the situation with a living person. Upon this basis Plaintiff asserts that emergency steps relied upon in cases such as *Schmerber* and *Findlay* are not here present as there is no danger that a reasonable delay to obtain a search warrant would affect the evidentiary value of the sample. The appropriate test is not whether it was reasonable to procure a search warrant but whether the search was reasonable under the existing circumstances. *United States* v. *Rabinowitz,* 339 U.S. 56; *Wright* v. *United States,* Eighth Circuit, ..... F. 2d ....., (February 19, 1968)."

From the above it is clear that the Court of Appeals was not making a decision in conflict with *Rabinowitz, Schmerber or Breithaupt,* but was simply following those previous decisions.

## CONCLUSION.

This case presents a question of fact that has already been decided by a duly impanelled jury. The decision in this case truly and accurately applies the proper guidelines previously pronounced by this Court as it concerns the withdrawing of blood samples in relationship to the Fourth Amendment of the United States Constitution. The decision of the District Court and the Circuit Court

of Appeals is in harmony with the previous pronouncements of this Court, and no good purpose would be served in having a hearing before this Court on the merits simply to review a fair, impartial and just decision of a duly impanelled jury.

Respectfully submitted,

JAMES A. LORENTZEN,
THEODORE T. DUFFIELD and
GEORGE E. WRIGHT.
729 Exchange Building,
Des Moines, Iowa 50309,
*Attorneys for Respondents.*

# APPENDIX A

## SECTION 339.5
## 1966 CODE OF IOWA

"339.5. Inquiry-report. Upon receipt of such notice the county medical examiner shall take charge of the dead body, make inquiries regarding the cause and manner of death, reduce his findings to writing on forms provided by the commissioner of public health for such purpose, and deliver the original of such form to the county attorney, retaining one copy for his own use, and forwarding another copy to the criminal investigation division of the state department of public safety.

For each such preliminary investigation, including the making of the required reports, the county medical examiner shall receive a fee of fifteen dollars, plus his actual expenses, to be paid by the county for which he is appointed."

## SECTION 339.6
## 1966 CODE OF IOWA

"339.6. Autopsy. If, in the opinion of the county medical examiner, an autopsy examination is advisable and in the public interest, such autopsy shall be performed. The autopsy may be made by the county medical examiner or by such competent pathologist as he may designate. A full record and report of the facts developed by the autopsy and findings of the person making such autopsy shall be made promptly and filed with the county medical examiner and in the office of the county attorney. Pertinent information embodied therein shall be furnished forthwith to the appropriate state department or agency by the county medical examiner."